



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 29, 2003

Mr. Jack Steele
Executive Director
Gulf Coast Small Business Finance Corp.
P.O. Box 22777
Houston, Texas 77227-2777

OR2003-6808

Dear Mr. Steele:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187592.

You inform us that the Gulf Coast Small Business Finance Corporation (the "corporation") received a request for all information provided by Genesis Investor's Group, LLC, ("Genesis") and their operating company, CJ Entertainment ("CJ") pertaining to a loan made to Genesis by the corporation, to include loan documents, applications, business plans and leases.¹ You initially claim that the corporation is not a governmental body subject to the Public Information Act (the "Act"), chapter 552 of the Government Code. Alternatively, you argue that portions of the requested information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered the additional information you submitted, as well as the comments and information submitted to this office by the requestor. See Gov't Code §§ 552.303 (b), (c), 552.304.

¹ Although you state that the corporation received the request for information, we note that the request was made to James Walsh, who is listed on the Houston-Galveston Area Council's ("H-GAC") website as the Chief Loan Officer of H-GAC, who responded to the requestor. We further note that in his request for information, the requestor inquired about any H-GAC "protocols" for making an information request. Therefore, it appears that the requestor was in fact seeking information from H-GAC and not the corporation.

We begin with your argument that the requested information is not subject to the Act, because the corporation is not a governmental body subject to the Act. In this regard, we note that the corporation was created by, and has as its principal place of business the offices of, H-GAC, a council of governments created under the predecessor to section 391.003 of the Local Government Code. *See* Attorney General Opinion H-1262 (1978) (finding that H-GAC is council of governments created pursuant to predecessor to section 391.003 of Local Government Code). Councils of governments created under this statute are considered political subdivisions of the state. Loc. Gov't Code § 391.003(c). Further, we note that H-GAC's activities are financed by local government dues, state appropriations, and state and federal grants and contracts. *See* Loc. Gov't Code §§ 391.011 (b), (c), .012. Therefore, we initially find that H-GAC is a governmental body for purposes of the Act. *See* Gov't Code § 552.003 (1)(A)(xii) (governmental body under Act includes part, section, or portion of organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds); *see also* Open Records Decision Nos. 661 (1999) (recognizing that as governmental body, Deep East Texas Council of Governments has discretion to release confidential address information to county judge for purpose of sending tax and voter registration notices, without violating confidentiality of information); 267 (1981) (noting that Concho Valley Council of Governments, in raising exceptions under Act to disclosure of requested information, did not question status of council as governmental body subject to Act).

Next, we note that the Act applies only to "public information." *See* Gov't Code § 552.021. "Public information" is defined as

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all information in the physical possession of a governmental body is public information that is subject to chapter 552. *See* Open Records Decision No. 549 at 4 (1990), 514 at 1-2 (1988). Chapter 552 also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision Nos. 558 (1990), 462 at 4 (1987) (chapter 552 applies to information collected or maintained by consultant if the information relates to governmental body's official duties or business, consultant acts as agent of governmental body in collecting

information, and governmental body has or is entitled to access to the information). However, chapter 552 does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989). Thus, if H-GAC maintains the requested information, or if it is maintained for H-GAC and H-GAC owns or has a right of access to it, and the information relates to the transaction of official H-GAC business, then this information is public information subject to the Act.

You inform us that the corporation was created by H-GAC during the 1980s for the purpose of authorizing small business fixed asset loans through the U.S. Small Business Administration's ("SBA") Section 504 program. According to information provided to this office by the requestor, H-GAC's website lists loans to small businesses under the SBA 504 program as part of H-GAC's Economic Development services. Specifically, the website states:

Serving local governments is H-GAC's chief mission. H-GAC's planning activities, technical assistance, and services available to local governments include: **Economic Development** - Assists counties and communities in developing economic development and diversification plans, *promotes and assists businesses in obtaining Section 504 SBA loans* and EDA public works grants, and other job-creating financial assistance.² [Italics added].

By letter dated September 15, 2003, this office asked you which entity, H-GAC or the corporation, maintains the requested information, and whether H-GAC has a right of access to the information. You responded:

The Corporation's bylaws formally designate the Executive Director as its officer charged with maintaining corporate records. The Executive Director delegates maintenance of loan application and closed loan files to the loan officer, who serves as the Corporation's Assistant Secretary, and its loan processing assistant. These persons are compensated through fees generated by the Corporations activities. The only persons with a legal right of access to the requested information are the Corporation's board, the Corporation's officers and those staff assigned to the Corporation. H-GAC's Board itself, and all H-GAC staff and management not assigned to the Corporation, do not have access to the requested information Information contained in individual loan applications and files ... is not used by H-GAC. The requested information has not been provided to H-GAC board members or any entity not a party to the loan. Periodically, a statistical report of overall Corporation loan activity is provided to the H-GAC Board of Directors, but

²See <http://www.h-gac.com>

it does not include specific information concerning any loans or loan applications.

In this regard, we note that, according to the articles of incorporation (the "articles") and bylaws (the "bylaws") of the corporation that you provided to this office, the board of directors of H-GAC have the authority and responsibility to appoint all members of the corporation, as well as the authority to remove members from the corporation at any time without cause. The board of directors of the corporation in turn is made up of nine members of the corporation, who also serve as the loan committee. We further note that, according to the bylaws, the Executive Director of H-GAC is also the Executive Director of the corporation, that the Assistant Secretary of the corporation is designated by the bylaws as being "a member of the H-GAC staff," and that, as you inform us, these two individuals are charged with maintenance of the information at issue. In addition, as noted above, the corporation's principal office is the office of H-GAC. Furthermore, we note that, according to the bylaws, "[H-GAC] shall be responsible for receipt, custody, disbursement and accounting for all corporate funds. . . . All checks and drafts on the Corporation's bank accounts and all bills of exchange and promissory notes, and all acceptances, obligations and other instruction for payment of money, shall be signed by the Chairperson of the Board of [H-GAC] and Executive Director or their designees." Finally, we note that the bylaws provide that the board of directors of H-GAC may dissolve the corporation and, according to the articles, on dissolution, liquidation or winding up of the corporation, the assets of the corporation shall be distributed to H-GAC or such entities as H-GAC may designate.

After careful review of all of the information you have provided, as well as the information provided by the requestor, we conclude that, by virtue of the relationship between H-GAC and the corporation, the corporation collects and maintains the information for H-GAC, and H-GAC either owns the requested information or at least has a right of access to the information in the possession of the corporation. We further conclude that the information relates to the transaction of official H-GAC business. Therefore, on the basis of the foregoing facts, we find that the requested information is public information for purposes of the Act and must be released to the requestor unless an exception applies to the information. As we are able to make this determination, we need not reach the issue of whether the corporation is itself a governmental body for purposes of the Act.³ We will now address your raised exceptions to disclosure.

³We note your reliance on Attorney General Letter Opinion No. 96-146 (1996), in which this office determined that a statewide certified development corporation was not required to comply with the Open Meetings Act, to support your position that the corporation is not a governmental body subject to the Act. Because we do not reach this question, we need not address the applicability of that opinion to our conclusion in this matter.

You argue that the submitted information, specifically including loan application documents, SBA documents, information pertaining to the project at issue, as well as closed loan documents, are excepted from disclosure under sections 552.101 and 552.110. Pursuant to section 552.305 of the Government Code, you notified the interested third party of this request for information and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Genesis has not provided reasons explaining why any of the information at issue should not be released. Therefore, we have no basis to conclude that release of Genesis' information would implicate its proprietary interests. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Next we address your assertion that the corporation has a section 552.110 interest in the requested records. Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b). We note that, by its terms, section 552.110 only protects the interests of the person from whom the information was obtained. The provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. In this case, even assuming that the corporation is not a governmental body for purposes of the Act, (a finding we do not make), and could argue section 552.110 on its own behalf, we find that you have provided only conclusory arguments about how release of the information would competitively harm the corporation. Therefore, none of the requested information may be withheld under section 552.110(b).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is protected by the common-law right of privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of

legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977).

This office has determined that some personal financial information is highly intimate or embarrassing and thus meets the first part of the *Industrial Foundation* test. See Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989). In addition, common-law privacy generally protects the "background" financial information of an individual, that is, information about the individual's overall financial status and past financial history. Open Records Decision Nos. 523 at 3-4 (1989), 373 at 3 (1983). We note, however, that common-law privacy protects the rights of individuals, not corporations. See Open Records Decision Nos. 620 (1993) (corporation has no common law privacy interest in its financial information), 192 (1978); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). We have marked the personal financial information that is excepted from disclosure under section 552.101 and common-law privacy.

Section 552.101 also excepts information made confidential by statutory law. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential.⁴ Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of the possible existence of liability of any person under title 26 of the United States Code for any tax.⁵ The information submitted includes tax return information. Therefore, we have marked the submitted documents that must be withheld from disclosure under section 552.101 as information deemed confidential by federal statute.

Additionally, the submitted information contains social security numbers that may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. See Open Records Decision No. 622 (1994). However, it is not apparent to us that the social security numbers contained in the information at issue were obtained or are maintained by the corporation pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the corporation to obtain or maintain a social security number. Therefore, we have no basis for concluding that

⁴See Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms).

⁵See 26 U.S.C. § 6103(b)(2).

the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution you, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure that such numbers were not obtained or are not maintained by the corporation pursuant to any provision of law enacted on or after October 1, 1990.

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, you must withhold the fingerprints, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

Lastly, the submitted information contains bank account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. You must, therefore, withhold the marked bank account numbers under section 552.136.

To summarize, we find that the submitted information constitutes public information under the Act, which must be released to the requestor, with the exception of information we have marked to be withheld under sections 552.101 and 552.136 of the Government Code, and social security numbers, if applicable.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 187592

Enc. Submitted documents

c: Mr. David Crowe
5311 Kirby #207
Houston, Texas 77005
(w/o enclosures)